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No. 03-195

In The Supreme Court of the United States

JAMES V. JIMENEZ,

Cross-Petitioner,

v.

PAW PAW'S CAMPER CITY, INC.,

Cross-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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CROSS-RESPONDENT'S BRIEF IN OPPOSITION

Cross-Respondent herein, Paw Paw's Camper City, Inc. (hereinafter "Paw Paw's"), urges the rejection of Cross-Petitioner, James V. Jimenez's ("Jimenez"), Cross-Petition for Writ of Certiorari; Paw Paw's contends Jimenez has failed to present valid legal argument for his position as he continues to misapply and misinterpret the binding decisions of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996) and *State Farm Mutual Automobile Insurance Company v. Campbell*, ___ U.S. ___, 123 S.Ct. 1513 (2003).

Paw Paw's hereby incorporates, for the purposes of this brief, the information provided in Paw Paw's Petition for Writ of Certiorari sections labeled: "Questions Presented," "List of Interested Parties," "Corporate Disclosure Statement," "Jurisdiction," "Statutory and Regulatory Provisions Involved," and "Course of Proceedings and Disposition of the Case Below."

STATEMENT OF THE FACTS

Paw Paw's hereby incorporates its original Petition for Writ of Certiorari and Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari, and thereby adopts, for purposes of this brief, its original Statement of the Facts. However, Paw Paw's corrects the following information relayed in its "Course of Proceedings and Disposition of the Case Below" section. In said section, original Writ of Certiorari, Paw Paw's submitted on November 27, 2002, its post-trial motions were filed. As a correction, Paw Paw's submits it filed said motions on

November 27, 2001. Thus, Paw Paw's timely sought review.

In reply, Paw Paw's submits Jimenez's Brief in Opposition to Petition for Writ of Certiorari asserted certain erroneous facts. In his submission, Jimenez went to great lengths to portray Paw Paw's and its owners, as racists. Specifically, Jimenez contends he was the "only person of color in sales/management." (Jimenez's Response p. 3). Remarkably, Jimenez ignores that his brother was not only a "person of color in sales/management," but also that David Jimenez, an Hispanic American, partially owned the company at the time Jimenez was hired. Jimenez's blatant attempt to ignore his brother's heritage and ownership interest is erroneous and refutes Jimenez's assertions of sweeping, calculated racism at Paw Paw's.

Additionally, the Jimenez brothers were not the only minorities that were employed in management at Paw Paw's. In his response, Jimenez asserted he was the only minority present in Paw Paw's "all white sales and management staff." (Jimenez's Response, p. 5). Again, such an assertion ignores other employees' ethnic heritage. Even after the untimely death of David Jimenez, minorities continued to be employed as management staff at Paw Paw's. Ironically, Jimenez's alleged main abuser, Matt Margetta, General Manager and part owner, testified to and acknowledged his Italian heritage. In no uncertain terms, though Jimenez continues to paint a skewed picture, he was not the only Paw Paw's minority employee or management member.

Furthermore, W. B. Herring, Jr. and Matt Margetta repeatedly denied any such intentional discrimination or reprehensible conduct. At trial, both Mr. Herring and Mr.

Margetta testified and specifically denied intentional and non-intentional discrimination. In support, aside from argument, Jimenez has failed to present sufficient evidence of this alleged intentional wrong doing. Consequently, Jimenez's intentional discrimination arguments should continue to be dismissed as unfounded, as the jury verdict indicated.

SUMMARY OF THE ARGUMENT

Jimenez's arguments have no merit. In Jimenez's Conditional Cross-Petition for Writ of Certiorari, he presented two questions for review:

> (1) Whether the remittitur affirmed by the Fifth Circuit was unnecessary; and
>
> (2) Whether the Fifth Circuit erred in affirming the District Court's erroneous application of two of *BMW's* three guideposts.

Paw Paw's asserts the remittitur was absolutely necessary and Jimenez is mistaken in his assertion that the District Court, and the Fifth Circuit, misapplied the *BMW v. Gore* guideposts in favor of Paw Paw's.

In the Petition for Writ of Certiorari, Paw Paw's contended the jury award of punitive damages should be vacated by this Honorable Court. However, in the alternative, if this Honorable Court upholds the punitive damage award, Paw Paw's prays the punitive damage award be further reduced. Paw Paw's urges, in no event, the remittitur be set aside.

As to Jimenez's second issue, Jimenez has failed to show any substantive argument for the alleged legal

misapplication, but instead misapplies the decision of *BMW v. Gore* in his analysis. Consequently, Jimenez's Conditional Cross-Petition for Writ of Certiorari is without substance and should be summarily dismissed.

REASONS FOR DENYING JIMENEZ'S CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

I. Jimenez critically misplaces the focus of the Due Process analysis on the concept of overreaching while ignoring the central issue in both controlling decisions: the arbitrary deprivation of a citizen's property as unconstitutional.

According to *BMW v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996), the jury's punitive damage award should be vacated; however, if this Honorable Court upholds the punitive damage award, the award should be further reduced per the directives of *BMW v. Gore*.

Despite the jury's award of no actual damages, and final actual damages of one dollar as awarded by the Magistrate Judge through additur, Jimenez contends the final $80,000 punitive damage award is in conflict with the binding decisions of *BMW v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996) and *State Farm Mutual Automobile Insurance Company v. Campbell*, ___ U.S. ___, 123 S.Ct. 1513 (2003). In doing such, Jimenez critically misplaces the focus of the Due Process analysis on the concept of overreaching while ignoring the central issue in both controlling decisions: the arbitrary deprivation of a citizen's property as unconstitutional. This Honorable Court, in *BMW*, established three guideposts for determining whether a punitive damage

award is excessive only after amplifying the purpose of the guideposts by stating "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a state may impose." *BMW*, 517 U.S. at 574 and *State Farm*, 123 S.Ct. at 1520. The opinions of *BMW* and *State Farm* do not state that the respective punitive awards were reduced due to an overreaching nature of the jury's award; instead, the opinions evaluate excessiveness of a punitive damage award in relation to whether the defendant received "adequate notice of the magnitude of the sanction" as determined by 1) the degree of reprehensibility of the conduct, 2) the disparity between the harm or potential harm suffered by the plaintiff and his punitive damage award, and 3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases. *BMW* at 575. As such, the decisions of *BMW* and *State Farm* are not only binding and applicable in this case, but dictate the reduced punitive award of $80,000 to Jimenez, especially in light of the 80,000 to 1 ratio represented, is grossly excessive under the applicable Due Process analysis.

In *BMW*, the specific question presented was whether a two million dollar punitive damage award exceeded constitutional limits. *BMW* at 575. Erroneously, Jimenez argues that in order to apply *BMW*, Paw Paw's must first establish a constitutional violation. (Jimenez's Conditional Cross-Petition, pp. 5-9). However, Jimenez misses the point. *BMW* applies because the "excessive" nature of the punitive damage award is the constitutional violation that triggers the Due Process consideration. *BMW* at 575. In *State Farm*, this Honorable Court explained, "the Due Process Clause

of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 123 S.Ct. at 1519-1520. Paw Paw's contends the punitive damage award in this case was grossly excessive and completely arbitrary. As no actual damages were awarded by the jury, and only one dollar awarded by the District Court Magistrate, there is absolutely no indication as to how the punitive damages were calculated, or as to what actual harm they were meant to punish. The punitive damage award in this case is an example of an absolutely arbitrary award in violation of the Due Process considerations. Thus, regarding the overarching constitutional concern, Jimenez's assertions, that the trial court misapplied *BMW* in favor of Paw Paw's, are unfounded.

II. Jimenez's analysis of the application of the *BMW v. Gore* guideposts misinterprets and misapplies the law.

A. First Guidepost: The Reprehensibility Analysis

In specifically addressing the analysis under the *BMW* guideposts, Paw Paw's continues to stress that the alleged reprehensibility of the conduct in question does not alone elevate this case beyond application of the other aforementioned *BMW* factors. Paw Paw's maintains that under the established reprehensibility analysis hierarchy, the conduct alleged by Jimenez is not of the most reprehensible sort. The hierarchy of reprehensible conduct, as set forth in *BMW v. Gore*, requires consideration of whether "the harm was physical rather than economic; the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; the conduct involved repeated actions or was an isolated incident; and the harm resulted from intentional malice, trickery, or deceit, or

mere accident." *BMW v. Gore*, 517 U.S. at 576-577. Paw Paw's maintains the alleged conduct in question presented no physical harm to Jimenez, did not show any reckless disregard for the health or safety of others, nor was the result of intentional malice trickery or deceit. While the allegations were of more than an isolated incident, "the existence of any one of the factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damage award." *State Farm*, 123 S.Ct. at 1521. As such, Paw Paw's contends under these factors, the reprehensibility of the alleged conduct does not justify the disproportionate, unsubstantiated, excessive punitive damage award rendered against Paw Paw's.

Further, the jury's punitive damage award was based on improperly admitted evidence which prejudiced the jury. Despite Jimenez's arguments, the evidence regarding Jermaine Washington was not intricately connected to Jimenez's claims and should have been excluded. "Due Process will not permit courts in the calculation of punitive damages, to adjudicate the merits of the hypothetical claims of other parties under the guise of the reprehensibility analysis." *State Farm* at 1523. Throughout this case, Jimenez relied upon alleged discrimination against other minorities and alleged fraudulent business practices, which caused the jury to hear prejudicial information and base its decision on this improperly admitted evidence. Thus, taken in total, as this inflammatory evidence influenced the jury, the punitive damage award should be vacated.

Jimenez erroneously contends the punitive damage award is directly related to the alleged conduct of Paw Paw's staff, and that no evidence exists that Paw Paw's was punished for anything other than misconduct directed

at Jimenez. (Jimenez's Conditional Cross-Petition, p. 7). Paw Paw's contends that had a "direct relationship" been established at trial, an award of actual damages would have been made in favor of Jimenez, but instead Paw Paw's has been punished, through the incredibly disproportionate punitive damage award, for conduct that logically, considering the nominal amount of actual damages, cannot be linked to Jimenez personally. Paw Paw's asserts that logically, an award of actual damages would signify the jury's acknowledgement of harm to Jimenez, and thereby, suggests any punitive damages awarded would serve as punishment for the actual harm to Jimenez. However, no such actual damage award was made by the jury, though actual damages would have been simple to calculate, and only a nominal amount of one dollar was awarded by the judge. Therefore, no personal harm to Jimenez was established at trial and any punitive damages leveled against Paw Paw's must be for conduct unrelated to Jimenez personally. The only other plausible explanation is that if the alleged conduct against Jimenez is the supporting basis for the punitive damage award, the punitive damage award is improper. If the alleged conduct of Paw Paw's was not egregious enough to cause actual harm to Jimenez, the conduct certainly cannot be egregious enough to warrant punitive damages.

B. The Second Guidepost: Ratio Analysis

Addressing the second *BMW* guidepost, Jimenez's potential harm argument is flawed. In support, Jimenez submits that an evaluation of his potential harm would substantiate the punitive damage award. Repeatedly, throughout the history of this matter, the jury and the lower courts agreed: Jimenez did not suffer any harm. In

this case, the issue of potential harm is irrelevant. Jimenez could not and did not establish any *actual* harm. Logically, if Jimenez did not suffer actual harm, he has no argument for potential harm. Only the most arbitrary of awards could be substantiated by potential harm, when no actual harm was found to be compensable.

In *Kolstad v. American Dental Assoc.*, 527 U.S. 526, 119 S.Ct. 2118 (1999), this Court "confirmed that a showing of discrimination will support compensatory damages, but more is needed for an award of punitive damages." *EEOC v. EMC Corporation of Massachusetts*, 205 F.3d 1339, 2000 WL 191819**7 (6th Cir. (Mich.)). Paw Paw's maintains that not only is "more needed" for an award of punitive damages, but that a verdict which finds no actual harm should not be allowed to stand as the support for an award of punitive damages. Furthermore, Paw Paw's reasons that potential damages, without a finding of actual compensatory damages, should never be the sole basis for a punitive damage award.

Jimenez consistently theorizes that the finding of no actual harm is of no moment and that punitive damages can fairly be based on potential harm to the defendant when no actual harm is found. In contradiction, Paw Paw's submits that while "potential harm" is mentioned in the second *BMW* guidepost, the term is not meant as a panacea by which plaintiffs who have neglected to prove actual harm may still justify an otherwise unsupportable, disproportionate, unconstitutional punitive damage award. Under Jimenez's analysis, he should be allowed to capitalize on actual damage awards which have been proven and supported in other cases, by other plaintiffs and under other facts, despite his total inability to prove harm to himself. In the interests of fairness and equity, the

proportionality of Jimenez's punitive damage award must be reviewed in light of his own actual damage award, not the actual damage awards rendered in other cases. Paw Paw's asserts the potential harm factor in an analysis must be supportable, specifically quantifiable and inextricably linked to the particular plaintiff, or otherwise be a gross example of the very arbitrary deprivation of property that the *BMW* decision is meant to extinguish.

Jimenez explains his reliance on potential damages, without any finding of actual damage, by analogizing that "a gunman who shoots into a crowded street still should be severely punished even though everyone miraculously avoided injury from bullets because potential harm could have been dozens murdered." (Jimenez's Conditional Cross-Petition, p. 11). Paw Paw's contends that the aforementioned analogy is simplistic in that it disregards proportionality of punishment to harm. However, Jimenez's use of this analogy is typical of his approach to this case in that it represents an attempt to cloud the issue at hand with something more emotional. No one's life was endangered or threatened in this case, and Jimenez did not suffer any harm. Jimenez's reliance on the sensational is an attempt to avoid the merits of this case, as was his reliance on the alleged discrimination of other races and other analogies that do not bear similarity to the matter at hand.

Jimenez cites *BMW* when asserting that adjusting the actual damage award to account for potential harm, and not restricting punitive damage awards to amounts that are proportionate to the actual damage award, is "justified in cases in which injury is hard to detect or non-economic harm might have been difficult to calculate." (Jimenez's Conditional Cross-Petition, p. 10). Paw Paw's asserts this

particular case is a prime example of an instance where actual damages, if they had been present, would have been easily identifiable and calculable. At trial, Jimenez offered evidence to the jury concerning actual damages. Jimenez presented figures depicting all allegedly lost wages, all possible negative impact on his earning potential allegedly resulting from the accused conduct, and testimony of a doctor concerning the effects of the alleged conduct on Jimenez's mental state. Despite enjoying ample opportunity, Jimenez failed to prove actual damages because all of the aforementioned evidence was categorically rejected by the jury.

C. The Third Guidepost: The Comparison

Regarding the third *BMW* guidepost, Jimenez proposes that because Congress has authorized punitive damage awards up to $300,000.00, in Title VII cases, damage awards of such a magnitude should be applicable in the instant case. (Jimenez's Conditional Cross-Petition, p. 14). However, proper reading of the applicable guidelines recognizes that important limitations govern such awards. Specifically, 42 U.S.C. § 1981(b)(3) provides:

> The sum of the amount of compensatory damages awarded under the section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party-
>
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000.00;

> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of the 20 or more calendar weeks in the current or preceding calendar year, $100,000.00;
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000.00; and
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.00.

Paw Paw's does not meet the requirements for the $300,000.00 punitive award, and therefore should not be subject to analogies which imply that the maximum penalty authorized under 42 U.S.C. § 1981(b)(3) would be appropriate in the instant case. In short, Paw Paw's did not employ in excess of 500 employees during the requisite time period. Further, Jimenez has no support for the repeated implication that Paw Paw's employed in excess of 500 people during the period in question. (Jimenez's Response, p. 14, Jimenez's Cross-Petition, p. 14). As such, with every insinuation that Paw Paw's is of comparable size to an entity that would be subject to the $300,000.00 maximum penalty, Jimenez misrepresents the truth. In fact, Paw Paw's had substantially fewer employees, which would not even come into consideration under (C) or (D) above. Though Congress has authorized awards of $300,000.00, such awards have been "authorized" in conjunction with the size of the respondent's work force and the gravity of the conduct, reserving the "maximum permissible awards" for the most egregious cases of discrimination. *Hennessey v. Penril Datacom Networks,*

Inc., 69 F.3d 1344, 1355 (C.A. 7 (Ill.) 1995). Consequently, Jimenez has misinterpreted the "authorized" punitive damage awards, as they conceivably could not apply to Paw Paw's, because Paw Paw's work force does not mandate maximum award figures, nor could the maximum punishment be fairly exacted against Paw Paw's. Paw Paw's submits that interests of fairness dictate a maximum penalty only be awarded, or analogized, in cases where the work forces are accurately compared for size, and the alleged conduct is at least egregious enough to be quantified in terms of actual harm to the plaintiff.

CONCLUSION

Paw Paw's prays Jimenez's Conditional Cross-Petition for Writ of Certiorari be denied. Paw Paw's also respectfully requests any awards and costs be properly vacated. In the further alternative, Paw Paw's requests its Writ of Certiorari be granted.

Respectfully submitted,

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